SUPERINTENDENT OF LANDS AND SURVEYS, SAMARAHAN DIVISION & ANOR v. ABAS NAUN & ORS AND ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
ZALEHA ZAHARI FCJ
JEFFREY TAN FCJ
[CIVIL APPEALS NO: 01(F)-14-07-2012(Q) & 01(F)-15-07-2012(Q)]
18 NOVEMBER 2014

CIVIL PROCEDURE: *Mode of commencement of proceedings – Writ action – Whether claim should have been made by way of judicial review proceedings – Native customary rights-related claims – Whether strict compliance with statutory time limit would cause injustice – Whether procedural efficacy to give way to constitutional rights of natives – Rules of the High Court 1980, O. 53*

LAND LAW: *Customary land – Claim for – Native customary rights – Whether a public law or private law claim – Whether claim to be made by way of writ action or judicial review proceedings*

NATIVE LAW AND CUSTOM: *Customary land – Claim for – Native customary rights – Whether a public law or private law claim – Whether claim to be made by way of writ action or judicial review proceedings*

In two separate writs of summons actions filed against the appellants, the respondents, who were Bidayuhs and natives of Sarawak, prayed for various declaratory reliefs. The respondents pleaded that they previously acquired native customary rights ('NCR') over tracts of land ('NCR land'), which had since been infringed. The respondents claimed that their NCR was extinguished by the second appellant, acting through the first appellant, when alienating their NCR land through three provisional leases or forests timber licences to companies. Not only were they unaware of the granting of the leases, no compensation was also paid for. The respondents therefore pleaded that the alienation under those leases was null and void and that extinguishment of the NCR violated their rights under the Federal Constitution. The appellants applied to strike out the writ actions under O. 14A of the Rules of High Court 1980 ('RHC') on the grounds that the respondents ought to have proceeded by way of judicial review under O. 53 of the RHC. The appellants claimed that since the first appellant was a public authority, the act was of a public one and hence falling under the domain of public law. The appellants further contended that by undue delay and failing to commence the actions in accordance with O. 53 of the RHC, the respondents were guilty of abuse of legal process. The appellants' applications were dismissed by the High Court and the appellants' appeal against the High Court decision was dismissed by the Court of Appeal. The

appellants were granted leave to appeal to the Federal Court on the following question of law: whether a suit filed by a person claiming NCR to challenge the decision of a public authority which supposedly infringes the claimant's alleged rights is an exception to the general rule enunciated by the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors.*

Held (dismissing appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) NCR claims are disputes between private individuals claiming a private law right on one hand and with the public authority refusing to recognise their NCR at the other end. But by no figment of the imagination were the respondents seeking to nullify the public law on native rights but rather about them establishing the facts upon which their NCR claims were based. Obviously, the present appeals related essentially to questions of fact relating to private law of the respondents though enmeshed with public law. (para 31)

(2) In light of their want of sophistication let alone the respondents live deep in the hinterland, to expect the respondents to file judicial review applications within the legislated statutory time limit after the appellants' public acts and adhere to protocol finesse as fashioned out in O. 53 may lead to real injustice to them. Such strict expectation from the natives would result in "irreparable injustice" to them. Clearly the mode of O. 53 was unsuitable for cases of this genus. (para 35)

(3) The NCR land is fundamental to their social, cultural and spiritual survival as natives of Sarawak. The NCR land not only is a source of livelihood but constitute life itself. To allow with a stroke of a pen a singular government servant to oust and uproot a whole community, and without any real chance of voicing their grievances when extinguishing their NCR, was surely not what Parliament had in mind. (para 35)

(4) With the respondents having pleaded that their NCR and constitutional rights having been violated, procedural efficacy must surely give way to the supreme law of Malaysia. (para 36)

(5) Having considered the bigger picture, in light of constitutional, statutory and common law recognition of NCR, compounded by the injustice that may befall the respondents, on account of their disadvantaged predicament, the respondents' writ actions qualified as an exception to the norm. The question posed for the court's determination was thus answered in the positive. (paras 37 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Dalam dua writ saman berasingan yang difailkan terhadap perayu-perayu, responden-responden iaitu suku kaum Bidayuh dan anak negeri Sarawak, memohon pelbagai pengisytiharan relif. Responden-responden memplidkan

bahawa mereka terlebih dahulu telah memperoleh hak adat anak negeri ('HAAN') atas beberapa bidang tanah (tanah HAAN), yang telah dilanggar. Responden-responden mendakwa bahawa HAAN mereka telah dilupuskan oleh perayu kedua, yang bertindak melalui perayu pertama, apabila memberi milik tanah HAAN mereka melalui tiga pajakan sementara atau lesen pembalakan hutan kepada beberapa syarikat. Mereka bukan sahaja tidak menyedari pemberian pajakan tersebut telah dibuat, malah pampasan juga tidak dibayar. Responden, dengan itu, memplidkan bahawa pemberian milikan di bawah pajakan tersebut adalah tidak sah dan terbatal dan pelupusan HAAN telah melanggar hak-hak mereka di bawah Perlembagaan Persekutuan. Perayu-perayu memohon untuk membatalkan tindakan writ di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa responden sepatutnya memulakan tindakan dengan cara semakan kehakiman bawah A. 53 KMT. Perayu-perayu berhujah bahawa oleh kerana perayu pertama adalah pihak berkuasa awam maka tindakannya adalah bersifat awam, dengan itu ia terangkum dalam domain undang-undang awam. Perayu-perayu juga berhujah bahawa oleh sebab kelengahan tak wajar dan kegagalan memulakan tindakan mengikut A. 53, responden-responden didapati bersalah kerana penyalahgunaan proses guaman. Permohonan perayu-perayu telah ditolak oleh Mahkamah Tinggi dan rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi telah ditolak oleh Mahkamah Rayuan. Perayu-perayu telah diberikan kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan undang-undang berikut: sama ada guaman yang difailkan oleh seseorang yang menuntut HAAN bagi membantah keputusan pihak berkuasa awam yang didakwa telah melanggar hak-hak pemohon adalah satu pengecualian kepada peraturan umum yang dinyatakan dengan jelas oleh Mahkamah Persekutuan dalam *Ahmad Jefri Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors.*

Diputuskan (menolak rayuan dengan kos)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Tuntutan HAAN adalah pertikaian di antara orang perseorangan yang menuntut hak peribadi undang-undang dan dengan pihak berkuasa awam yang enggan mengiktiraf HAAN mereka. Responden-responden bukannya memohon untuk membatalkan undang-undang awam mengenai hak anak negeri tetapi ia berkenaan tindakan mereka membuktikan fakta-fakta berdasarkan tuntutan HAAN mereka. Dengan jelasnya, rayuan-rayuan ini adalah berhubungan dengan persoalan fakta-fakta berkaitan dengan undang-undang persendirian responden-responden walaupun terperangkap dengan undang-undang awam.

(2) Memandangkan ketidakcanggihan responden-responden dan fakta bahawa mereka tinggal dalam kawasan pedalaman, untuk mengharapkan responden-responden memfailkan semakan kehakiman dalam tempoh had masa berkanun yang digubal selepas tindakan awam perayu-perayu dan mematuhi kehalusan protokol yang dibentangkan dalam A. 53 akan

membawa kepada ketidakadilan terhadap mereka. Jangkaan ketat sedemikian daripada anak-anak negeri akan menyebabkan 'ketidakadilan yang tidak dapat dipulihkan' terhadap mereka. Dengan jelasnya, mod A. 53 tidak sesuai untuk kes-kes jenis ini.

(3) Tanah HAAN adalah asas kepada kehidupan sosial dan rohani mereka serta kebudayaan mereka sebagai anak negeri Sarawak. Tanah HAAN bukan sahaja punca mata pencarian tetapi merupakan kehidupan sendiri. Untuk membenarkan seorang kakitangan kerajaan dengan satu goresan pena mengusir dan membantun satu masyarakat, dan tanpa mana-mana peluang sebenar diberikan kepada mereka untuk menyuarakan ketidakpuasan hati mereka apabila HAAN mereka dilupuskan, sama sekali bukan merupakan niat Parlimen.

(4) Dengan hujahan responden-responden bahawa hak adat dan perlembagaan mereka telah dilanggar, keberkesanan prosedur harus memberi jalan kepada undang-undang tertinggi Malaysia.

(5) Setelah mempertimbangkan gambaran yang lebih besar, berdasarkan pengiktirafan undang-undang berkanun, perlembagaan dan pengiktirafan yang diberikan oleh common law terhadap HAAN, ditambah dengan ketidakadilan yang mungkin menimpa responden-responden, disebabkan kesusahan dan keadaan mereka yang kurang bernasib baik, tindakan writ responden-responden layak diberikan pengecualian kepada norma. Maka soalan yang dikemukakan untuk penentuan mahkamah adalah dijawab secara positif.

Case(s) referred to:

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 CLJ 885 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Jalang Paran & Anor v. Government of the State of Sarawak & Anor [2011] 3 CLJ 469 CA ***(refd)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA ***(refd)***

Ketua Pengarah Buruh v. Britania Brands (Malaysia) Sdn Bhd [2010] 6 CLJ 370 CA ***(refd)***

Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***

Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors [2014] 4 CLJ 393 CA ***(refd)***

Reilly v. Mackman [1982] 3 All ER 1124 ***(refd)***

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***

Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor [2004] 4 CLJ 775 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Federal Constitution, art. 13(1)
Rules of Court 2012, O. 53 r. 2(2)
Rules of the High Court 1980, O. 14A, O. 53
Land Code (Sarawak) (Cap 81), s. 5(3)(a)

For the appellants - Mcwillyn Jiok (Joseph HH Chioh with him); State Legal Officers, Sarawak
For the respondents - See Chee How; M/s Baru Bian Advocates

[Appeal from Court of Appeal; Civil Appeal No: Q-01-387-09]

Reported by Amutha Suppayah

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] On 27 June 2012 the Federal Court granted leave to the appellants for appeals number 01(f)-14-07-2012(Q) (the first appeal) and 01(f)-15-07-2012(Q) (the second appeal), cumulatively referred to as the appeals. The appeals were against the decisions of the Court of Appeal, delivered on 15 February 2012, dismissing the appellants' appeals against the decision of the High Court at Kuching.

[2] The leave granted was to determine the following question of law:

> Whether a suit filed by a person(s) claiming native customary rights to challenge the decision of a public authority which supposedly infringes the claimants alleged rights is an exception to the general rule enunciated by the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145.

Facts Of The Cases

[3] In two separate writs of summons actions filed against the appellants, the respondents who are Bidayuh by race and also natives of Sarawak, prayed for various declaratory reliefs. The respondents pleaded that they previously acquired native customary rights ("NCR") over tracts of land, hereinafter referred to as native customary rights land ("NCR land"), which had been infringed. The respondents claimed that the NCR was acquired pursuant to adat or customs of the Bidayuh of Sarawak, with their ancestors and themselves, being entitled to the NCR land. They also pleaded that the principle of common law aided them in acquiring the NCR. Those rights are recognised by the Sarawak Land Code (Cap. 81), created and acquired prior to 1 January 1958, and still subsisting as such. It was the respondents case that their NCR was extinguished by the second appellant, acting through the first appellant, when alienating their NCR land through three provisional leases or forests timber licences (interchangeably referred to as the leases) to companies over the NCR land. Not only were the act of granting the leases

not made known to them but no compensation in accordance with law was provided for. The respondents therefore pleaded that the alienation under those leases was null and void.

[4] We now provide more details. The respondents pleaded that the granting of the leases by the first and second appellants were public acts or decisions in the exercise of statutory powers, conferred by the Land Code of Sarawak (Cap. 81) and the Sarawak Forests Ordinance respectively. The acts of the appellants were invalid and unlawful, with the acts anchored heavily on abuse of power, breach of the rules of natural justice, unconstitutionality, illegality and breach of fundamental liberties as enshrined in Part II of the Federal Constitution. The respondents pleaded that the extinguishment of the NCR violated their rights under the Federal Constitution.

[5] The filing of the two writs of summons (the writs) by the respondents met with the appellants' disapproval who forthwith filed two separate applications to strike them out under O. 14A of the Rules of the High Court 1980 ("RHC"). The applications were heard together.

[6] The appellants argued that the principal remedies sought by the respondents in the writs were declarations to nullify the leases or to entitle them to exercise their alleged NCR over the alleged acquired NCR land. The format of the respondents' action therefore was improper and an abuse of the process of the court as their actions tantamount to challenging the decision of a public authority. That being so, the respondents ought to have proceeded by way of judicial review under O. 53 of the Rules of the High Court 1980 (O. 53).

[7] On 21 October 2009 the appellants' applications were dismissed with costs by the High Court. Being aggrieved, the appellants appealed to the Court of Appeal but also lost there on 15 February 2012. We now deal with the leave question as granted by the Federal Court.

[8] Not unlike the course of action taken by the High Court and the Court of Appeal, despite the respondents' actions being filed at different times, what with the lands and parties involved being different, we likewise heard the appeals together. The common thread that ran in the appeals enabled us to undertake this course of action.

Appellants' Position

[9] The appellants took the position that from the claims and prayers set out by the respondents in the writs the challenge was against the validity of the act causing the creation of the leases. As the first appellant was a public authority the act was of a public one, hence falling under the domain of public law. No private law element was involved be it in regard to the challenge of the leases or the respondents' alleged NCR over the alleged NCR land.

[10] In the course of his argument, amongst others, the appellants' counsel referred to the case of *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor* [2004] 4 CLJ 775 where at pp. 787-788 the following remarks were referred to:

> It is for the above reasons that I agree with the contention of counsel for the defendants that the plaintiffs, remedy to enforce or protect rights created or acquired or recognized in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs here should proceed to seek judicial review of the Minister's Direction and the 1st defendant's decision under O. 53 RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v. Mackman* which is the next question I will address.

[11] Learned counsel for the appellants also proceeded to discuss the case of *Jalang Paran & Anor v. Government of the State of Sarawak & Anor* [2011] 3 CLJ 469. He referred to pp. 481-483 (*Jalang*'s case), where the court opined:

> [34] The trial judge at p. 45 of the record of appeal found that in essence the claim of the plaintiff is against the decision of the Minister and accordingly the proper procedure is by way of judicial review to quash the decision of the Minister through a writ of *certiorari*. The judge grounded his decision on Clement Skinner J's (as he then was) decision in *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys, Kuching Division & Anor (supra)* where it was held that:
>
> > So although the plaintiffs say that the native customary rights which they claimed to have acquired (through persons who had created those rights before 1958) are proprietary in nature, the fact remains that the rights which they claim are rights created or recognized by statute, or put in another way, they are rights protected by public law. The plaintiffs' alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the Government (the defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law ...

[12] Other cases were submitted by the appellants and had also alluded to *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. It declared that matters that have substantive public law elements must be proceeded with through the mechanism of O. 53 of the RHC or otherwise that provision would be rendered redundant. Reference was made to James Foong FCJ's remarks, which read:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantive

A public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr. Zambry*. Much depends on the facts of the case. B But generally the court should be circumspect in allowing a matter which should be by way of O. 53 RHC to proceed in another form. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would in our considered opinion, be rendering O. 53 RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose C of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstance discussed.

[13] On the issue of exceptions, the appellants submitted that a suit filed by a person claiming NCR to challenge the decision of a public authority, D which supposedly infringed a claimants alleged rights was not an exception to the general rule. Counsel for the appellants' referred to the remarks in *Ahmad Jefri*, which read:

As Lord Diplock in *O'Reilly v. Mackman* reiterated, "The public interest in good administration requires that public authorities and third parties E should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision".

[14] Learned counsel further padded his argument by ventilating that by F undue delay and failing to commence the actions in accordance with O. 53 the respondents had been guilty of abuse of legal process.

[15] Learned counsel for the appellants finally wound up his submission by canvassing that in the appeals before us there was substantial public element involved, and what with *Ahmad Jefri* now having been followed by the Court G of Appeal in *Ketua Pengarah Buruh v. Britania Brands (Malaysia) Sdn Bhd* [2010] 6 CLJ 370, the proper action was by way of judicial review rather than by writ action.

The Respondent's Position

H **[16]** In reply, learned counsel for the respondents submitted that the issue of rights under NCR falls under the exception to the *O'Reilly*'s principle as it tilts more towards the realm of private law rather than of public law.

[17] The respondents submitted that native customary rights is a private right as decided by a number of cases at the High Court and the Court of I Appeal be they in West Malaysia or Sabah and Sarawak. The court in *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697, when dealing with this issue stated at pp. 725-726:

The other reason why the learned Judicial Commissioner found that no native customary rights had been acquired before 1921 was that, even if the appellant had acquired such rights under the 1920 Regulations, such rights were extinguished when the said land was reserved as part of the Shell Concession Area under the 1921 Order. We do not agree with this finding. It is quite evident to us from his finding that the learned Judicial Commissioner considered the 1921 Order applied with retrospective effect so as to take away any native customary rights that might have been acquired before its operation. With respect, this is misdirection by the learned Judicial Commissioner. It is a well-accepted rule of statutory interpretation that "a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms ...".

[18] The respondents also relied on the case of *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383, wherein Rhodzariah Bujang JC (as Her Ladyship then was) stated:

It is only right that I maintain a consistency in my approach to issues in dispute of this nature and to exercise the same deliberations with respect to the exceptions to the *O'Reilly*'s principle for indeed there are exceptions to the said rule. Lord Diplock in the *O'Reilly*'s case mentioned two ie, when the claim for infringement of a right of the plaintiff arising under private law arose by way of a collateral issue or when the parties did not object to the adoption of the procedure used. The categories of exception are not closed declared Lord Diplock in his judgment and it is to the other probable exceptions to the principle that I am directing my mind to.

[10] After giving the matter much thought, I am of the view that cases involving claims of native customary rights such as this one are an exception to the *O'Reilly*'s principle. I came to this decision because the prosecution of the plaintiff's right here is a genus in itself for by its very definition that right is largely unsupported by evidence; it is almost purely proved by oral evidence based on customs and tradition and is a peculiarity of only two states - Sabah and Sarawak. For the natives in these two states - their rights to the land - to forage, to hunt, to fish and to cultivate the land, for it is not just a place to build a home but their very livelihood - this right is handed down one generation to the next. To tie them down to the *O'Reilly*'s principle when more often than not they would only know about the transgressions of their right when the land had already been dealt with by the state authorities (as in this case) is an irreparable injustice which the Law Lords in *O'Reilly*, I am sure would never have intended.

[11] In holding that native customary rights cases are an exception to the *O'Reilly*'s principle I find support in the decision of the House of Lords in *Gillick v. West Norfolk & Wisbech Area Health Auth* [1986] AC 112. In the said case the plaintiff, a mother of five young daughters challenged, by way of a writ action, a decision of the Health authority in allowing doctors, in some circumstances, to give contraceptive advice and treatment to girls under 16 years of age without parental consent. Though

her claim was dismissed on merits, the House of Lords agreed that the procedure she adopted was right and one of the reasons given for that was in the words of Lord Scarman:

> ... the private law content of her claim was so great as to make her case an exception to the general rule.

> [12] It cannot be denied that the assertions by the plaintiff of having native customary rights over the land is embedded in private law; much more private, I would say than Mrs Gillick's concern for the morality of her young daughters who were not in any imminent danger of being prescribed contraceptive pills and being given treatment for related ailments. The plaintiffs in this case are facing the loss of their livelihood, their land and their rights to all these, obviously, are more private in nature than the motherly concerns of Mrs Gillick.

[19] We have given much coverage and space for the excellent discourse of Rhodzariah Bujang JC as it was adopted by the Honourable Chief Justice of Sabah and Sarawak in the recent Federal Court case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297. It was held as follows:

> I would like to make another note on the use of Order 53 of the Rules of the High Court 1980 in cases involving native customary rights. This point was touched upon in *Jalang*'s case by the Courts below. With respect, I find that it is highly unfair and prejudicial to insist upon the natives to proceed by way of Order 53 when they seek to enforce a constitutional right by way of declaration to that effect.
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> Although it does, to a certain extent, fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognized both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v. Mackman* [1982] 3 All ER 1124 principle.
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> I therefore prefer to approve the recent decision of the High Court in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 to that of *Shaharuddin Ali & Anor v. Superintendent of Lands & Surveys, Kuching Division & Anor* [2004] 4 CLJ 775.

[20] The respondents strongly urged this court to answer the question posed in the positive in that they were right in filing the writs rather than proceeding by way of judicial review under O. 53.

The Decision Of The Court

[21] The issue for our determination is actually restricted to the issue of whether it was appropriate for the respondents to commence their actions by filing the writs. Principally, the respondents pleaded that they obtained the NCR way back to the time of World War Two, whilst some even claimed as early as 1910. Their lives were disrupted when on a date unknown to them and without their knowledge and consent, companies obtained leases and

licences (from 2004-2008 by perusal of the pleadings) from the appellants over their NCR land. Neither had the appellants extinguished the respondents' NCR nor compensated them under the Land Code of Sarawak and the Federal Constitution. A

[22] In their defence, the appellants denied all the material particulars of the acquisition in relation to the NCR and demanded that the respondents be put to strict proof of the acquisitions. In a gist, serious dispute of facts existed. B

[23] Despite agreeing in their defence that there was serious disagreement as to the facts, yet striking out applications were filed by the appellants. The appellants grounded the applications on the premise that the determination of questions of law would finally dispose of the respondents' claims. As said earlier, the striking out applications were dismissed not only at the High Court but also at the Court of Appeal. C

[24] In the course of the submission before us the picture became clearer when learned counsel for the appellants submitted that the claims and prayers of the respondents which led to the appeals fell under the domain of public law. He in no uncertain terms said that no private law element existed, "In regard to the challenge to the issuance of the said provisional leases or the said forest timber licences or the alleged non-recognition and non-extinguishment of the respondents alleged NCR over part of land within the said land". D E

[25] To resolve the leave question for our determination it is essential to draw a distinction between private law proceedings and public law proceedings. Generally speaking when a decision is arrived at by a public body in performance of a public duty resulting in any infringement that affects substantive principles of public law, and which may affect members of the public, the proceedings that ensues is treated as public law proceedings. An aggrieved party may allude to judicial review under O. 53 at the High Court for any reparation of injustice and may include a prayer for a declaration as in the current appeals (O. 53 r. 2(2) of the Rules of Court 2012). F G

[26] The power of the High Court in a judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ("CJA"), in particular the additional powers that are set out at para. 1 of the Schedule to s. 25(2) of the CJA. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any orders, for the enforcement of the rights conferred by Part II of the Federal Constitution. H

[27] In the traditional sense judicial review refers to the exercise of the courts supervisory powers over the decisions of inferior tribunals and statutory bodies, but does not function as an appellate body (*Michael Lee Fook* I

Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227, *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 at p. 526).

[28] As opposed to public law proceedings, in private law proceedings only the parties who are directly concerned with the outcome of the litigation, are affected. The public at large are not usually interested in the outcome, except to see that the private law proceedings had been carried out in a fair and efficient manner when resolving disputes between individuals, and of enforcing the rights of one individual over another.

[29] The instant appeals concern the respondents' claim to NCR connected to the NCR land alienated under the leases by the appellants, which begs the question of a right over property. Without touching on the acts of the authorities (and importing ingredients of public law), at first blush the impression given is that the matter comes within the ambit of private law proceedings.

[30] A claim made by claimants for native rights is not a novel subject, as many a case of this nature has come before us for adjudication, be it from Sabah and Sarawak or even West Malaysia. In *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885; [1997] 1 MLJ 418 the court recognised the rights of the aboriginal people, which include ' ... the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land itself or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial ... In Malaysia the aborigines' common law rights include, *inter alia,* the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers. That view was affirmed by *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665; [1998] 2 MLJ 158 when it held that common law recognises native customary rights. In *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543; [2002] 2 MLJ 591 the trial judge appeared to have given some indication as to the limit of such claim ie, limited only to the area that forms their settlement, and not to the jungle at large where they used to roam to forage for their livelihood in accordance with their tradition. What is the area of the settlement and its size would be a question of fact. The Court of Appeal in *Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors* [2014] 4 CLJ 393; [2014] 3 MLJ 661 recognised the prevailing predicament of disputes when an NCR is claimed as against the stance of the authorities which refused to recognise the claimant's right.

[31] As indicated earlier, the matter before us is more procedural in nature ie, the use of appropriate procedure in enforcing the NCR. The contention of the respondents was that their rights to it had been adversely affected,

infringed or impaired by the issuance of the provisional leases and the forests timber licences. They challenged and questioned the legality and proper exercise of those statutory powers to issue the same. Needless to say, NCR claims are disputes between private individuals claiming a private law right on one hand and with the public authority refusing to recognise their NCR at the other end. But by no figment of the imagination were the respondents seeking to nullify the public law on native rights but rather about them establishing the facts upon which their NCR claims were based. Obviously the appeals before us related essentially to questions of fact relating to private law of the respondents though enmeshed with public law. James Foong FCJ in *Ahmad Jefri* did suggest that in a situation, if it is a mixture of public and private law then the court must ascertain which of the two is more predominant. Unfortunately the matter before us was not all that cut and dry. To surgically consider which law outweighs the other, may not only deprive the respondents of their day in court but also ignore the reality, *inter alia* that:

- The respondents pleaded that they had been dispossessed and unless permitted to adduce oral evidence they would be disadvantaged when attempting to establish their NCR claims;
- Oral evidence could surely help to clarify the customs and tradition which are peculiar to the Bidayuh;
- The respondents pleaded that they had been deprived of the NCR and yet had been compensated. If oral evidence were adduced the issue of compensation, be it eligibility or amount, could be resolved;
- The respondents was handicapped by illiteracy, poverty and insurmountable logistical problems as they live in the hinterland;
- Even if they were aware of the extinguishment of the NCR/alienation of the NCR land to third parties (companies), their lack of sophistication would not enable them to respond promptly to the rigours of O. 53. This brings to the forefront the factor of time and distance. If prompt compliance with the time requirement of O. 53 is meaningless to the respondents even if forewarned, any ignorance of time of alienation of their NCR over the leased land can only exacerbate matter; and to strike out the writs at such an early stage without them being given the opportunity to establish their claims would do injustice to their lives.

[32] Much earlier on we did state that as the issue of proprietary rights over NCR was central to the current discussion we hinted that the matter could easily fall within the ambit of private law proceeding. On the other hand the matter could also fall within the realm of public law as it could not be disputed that the appellants were the parties that issued the provisional leases and the forest licences.

[33] In the House of Lords case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 it was held that as a general rule, it is contrary to public policy and thus an abuse of process for a person who sought to establish that a decision or action of a person or body that had infringed rights to proceed by way of an ordinary claim (rather than the judicial review procedure). Despite the above holding Lord Diplock supplied a window of opening when he said:

> I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis ...

[34] Taking advantage of the crack an increasing number of NCR cases have tilted in favour of them falling under private law, with the latest being *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297. Richard Malanjum, Chief Judge, Sabah and Sarawak had occasion to state that in cases involving native customary rights O. 53 was not a suitable mode of proceeding, especially when the natives sought to enforce a constitutional right by way of a declaration to that effect. The learned Chief Judge gave further guidance on this matter when he likewise said that cases concerning native customary rights should be regarded as an exception to the rule in *O'Reilly* (*supra).*

[35] As illustrated above, in light of their want of sophistication let alone the respondents live deep in the hinterland, to expect the respondents to file judicial review applications within the legislated statutory time limit after the appellants' public acts and adhere to protocol finesse as fashioned out in O. 53 may lead to real injustice to them. Such strict expectation from the natives would result in "irreparable injustice" to them (*Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383). Clearly the mode of O. 53 is unsuitable for cases of this genus. It must be borne in mind that the NCR's value cannot stand on its own but intertwined with the NCR land. It is from this NCR land, which comprise farmland and forest that the respondents will derive food, valuable medicines, wildlife and other forest produce for their livelihood and sustenance. They will farm, cultivate and plant paddy, fruit trees, rubber trees, cocoa and other essential trees and crops on it. The NCR land is fundamental to their social, cultural and spiritual survival as natives of Sarawak. In other words the NCR land not only is a source of livelihood but constitute life itself. To allow with a stroke of a pen a singular government servant to oust and uproot a whole community, and without any real chance of voicing their grievances when extinguishing their NCR, was surely not what Parliament had in mind.

[36] The right to compensation when dispossessed of property is a constitutional right, borne out in art. 13(1) of the Federal Constitution and the language used is imperative and demands obedience. Specifically for Sarawak, alluding to the words used in s. 5(3)(a) of the Sarawak Land Code, compensation is mandatory when an extinguishment of any NCR takes place (as opposed to extinguishment of title over land). With the respondents having pleaded that their native customary rights and constitutional rights having been violated, procedural efficacy must surely give way to the supreme law of Malaysia. With so much at stake, and in light of the prevailing dispute of facts, how then are the respondents to mount a successful claim of the NCR if not by writs of summons?

[37] Having considered the bigger picture, in light of constitutional, statutory and common law recognition of NCR, compounded by the injustice that may befall the respondents, on account of their disadvantaged predicament, we find that the respondents' writ actions qualify as an exception to the norm.

[38] Apart from not finding any legal basis of the respondents having abused the process of court in filing the two writs we answer the question for our determination in the positive. We therefore unanimously dismiss the appeals with costs.